Supreme Court, U.S.
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In The

Supreme Court of the United States

THE GOVERNOR AND COMPANY OF
THE BANK OF SCOTLAND,

Petitioner,

vs.

HECTOR SABAY, VOLODYMYR SHEVCHUK,
NORMAN SOLIS, NOEL SOMOSIERRA,
GERRY SUYAT, ET AL.,

Respondents.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit**

PETITION FOR WRIT OF CERTIORARI

RICHARD J. DODSON, Bar Roll 4982
Counsel of Record
LAW OFFICE OF RICHARD J. DODSON
A Professional Corporation
628 North Boulevard
Baton Rouge, Louisiana 70802
Telephone (225) 344-0633

– and –

MICHAEL A. COLOMB, Bar Roll 1035
W. STEVEN MANNEAR, Bar Roll 9098
POYNTER, MANNEAR & COLOMB
A Professional Law Corporation

628 North Boulevard
Baton Rouge, Louisiana 70802
Telephone (225) 344-6733

Attorneys for Petitioners

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTION PRESENTED

I. May a court refuse to enforce a preferred maritime lien for 46 U.S.C. §10313(g) delay wages which is granted preference and priority over a preferred ship mortgage by the Commercial Instruments and Maritime Liens Act because the proceeds from the sale of the vessel are less than the indebtedness secured by the preferred ship mortgage?

LIST OF PARTIES

The parties to the action are The Governor and Company of the Bank of Scotland, M/V Maria S.J. In Rem, Diomedes Acaso, Niel Acomodar, Sotirios Alexious, Shestun Anatoliy, Alden Andov, Sarkis Andriasyan, Yoriy Andura, Jovental Apayor, Arsenio Arcojada, Roque Aricayos, S. Parrilla Arturo, Edmund Autor, Joemarie Banares, Romeo Baring, Jonathan Bautista, Porferio Bayadog, Konstantin Belimpassakis, Oleksandr Bloutov, Cesar Bisnar, Mykhaylo Boldyrev, Vadym Bozhok, Henry Calidro, Edgardo Caligan, Jolly Caligan, Jose Castor, Jovanni Cepeda, Eduardo Cortez, Ciriaco Dalida, Danilo De Jesus, Martin De La Cruz, Perfecto Del Rosario, Eletheiors Demetriades, Oleg Dolgy, Pamagiotis Douzinas, Andrey Doroshenko, Dhimiter Drenko, Romeo Durain, Joseph Dy, Jalandomi Eduardo, Oktavian Fanarzhi, Andrey Fedoseyenro, Victuriano Fermano, Samson Flores, Sabas A. Gabayan, June Galano, Aseterio Gantangko, Jose Ernan Genita, Armando Gongora, Francis Herico, Jonathan Igsolo, Eddie Jocson, Danila Juntilla, Oleksandr Kharchenko, Oleksandr Kolosvetob, Anatoliy Kudashev, Wenfredo Lamoste, Joel Lipumano, Sergey Maday, Ralph Maghanoy, Marcelo Mamuyac, Ioannis Mantas, Sergiy Mayorov, Sergio Monzolin, Edwin Morato, Ivan Mozzaun, K. Mpeumpasakis, Milan Mrsic, Vaso Mrsic, Oleksandr Mutset, Jose Near, Denis Necosia, Arkadiy Nergish, Dominador Omega, Gennadiy Osnovskiy, C. Sunit Pedro, Vasiliy Pilipenko, Sergey Polyakov, Julian Poquita, Ernesto Ramirez, Joaquin Rifa, Benedict Romana, Hector Sabay, Mikhail Sherbesko, Volodymyr

LIST OF PARTIES – Continued

Shevchuk, Rene Sisbreno, Eduard Sokolov, Norman Solis, Noel Somosierra, Edgardo Sornillo, Elmo Sornillo, Gerry Suyat, Orlando Tagudin, Elmer Tautho, Sammy Torres, Enrie Verde, Andriy Vyazovsky, Sergey Yakovenko, Sergiy Yeremyeyev, Golden Lines Shipping, Inc., and, Kosmas Marine Line, Inc.

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PETITION FOR WRIT OF CERTIORARI

Hector Sabay, Volodymyr Shevchuk, Norman Solis, Noel Somosierra, Gerry Suyat, et al., respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on April 28, 2000, in order to resolve the conflict created by the decisions of other circuit courts of appeal and this Court.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit that gives rise to this Petition is published at 211 F.3d 261 (5th Cir. 2000). It is reprinted in the Appendix, App. 1. By Order filed June 2, 2000, the Fifth Circuit denied the Petition for Rehearing En Banc. (Appendix, App. 52) The opinion of the United States District for the Eastern District of Louisiana is published at 1998 WL 781988. It is reprinted in the Appendix, App. 44.

JURISDICTIONAL STATEMENT

On November 5, 1998 the United States District Court for the Eastern District of Louisiana entered a summary judgment dismissing the seamen's in rem claims for delay wages pursuant to 46 U.S.C. §10313(g). The court overruled the seamen's timely-filed motion for reconsideration on January 20, 1999. On January 25, 1999, the seamen filed a notice of appeal to the United States Court of

Appeals for the Fifth Circuit. On April 28, 2000, the United States Court of Appeals for the Fifth Circuit affirmed the decision of the district court. On June 2, 2000, the Fifth Circuit Court of Appeals denied the seamen's timely-filed motion for rehearing and suggestion for rehearing en banc. Pursuant to Supreme Court Rule 13.1, this petition has been filed within 90 days of the denial of the rehearing.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

STATUTES INVOLVED IN THE CASE

46 U.S.C. §10313 provides in pertinent part:

> (f) At the end of a voyage, the master shall pay each seaman the balance of wages due the seaman within 24 hours after the cargo has been discharged or within 4 days after the seaman is discharged, whichever is earlier. When a seaman is discharged and final payment of wages is delayed for the period permitted by this subsection, the seaman is entitled at the time of discharge to one-third of the wages due the seaman.
>
> (g) When payment is not made as provided under subsection (f) of this section without sufficient cause, the master or owner shall pay to the seaman 2 days' wages for each day payment is delayed.

46 U.S.C. §10317 provides:

> A master or seaman by any agreement other than one provided for in this chapter may not forfeit the master's or seaman's lien on the vessel or be deprived of a remedy to which the

master or seaman otherwise would be entitled for the recovery of wages. A stipulation in an agreement inconsistent with this chapter, or a stipulation by which a seaman consents to abandon a right to wages if the vessel is lost, or to abandon a right the seaman may have or obtain in the nature of salvage, is void.

46 U.S.C. §31301 provides:

(5) "preferred maritime lien" means a maritime lien on a vessel –

(A) arising before a preferred mortgage was filed under section 31321 of this title;

(B) for damage arising out of maritime tort;

(C) for wages of a stevedore when employed directly by a person listed in section 31341 of this title;

(D) for wages of the crew of the vessel;

(E) for general average; or

(F) for salvage, including contract salvage;

46 U.S.C. §31326 provides:

(a) When a vessel is sold by order of a district court in a civil action in rem brought to enforce a preferred mortgage lien or a maritime lien, any claim in the vessel existing on the date of sale is terminated, including a possessory common law lien of which a person is deprived under section 31325(e)(2) of this title, and the vessel is sold free of all those claims.

(b) Each of the claims terminated under the subsection (a) of this section attaches, in the same amount and in accordance with their priorities to the proceeds of the sale, except that –

(1) the preferred mortgage lien, including a preferred mortgage lien on a foreign vessel whose mortgage has been guaranteed under title XI of the Merchant Marine Act, 1936 (46 App. U.S.C. 1101 et seq.) has priority over all claims against the vessel (except for expenses and fees allowed by the court, costs imposed by the court, and preferred maritime liens); and

(2) for a foreign vessel whose mortgage has not been guaranteed under title XI of that Act, the preferred mortgage lien is subordinate to a maritime lien for necessaries provided in the United States.

STATEMENT OF CASE

On March 24, 1997 twenty-two (22) Maria S.J. seafarers were not paid their wages "without sufficient cause". The owner of the M/V Maria S.J. was solvent on March 24, 1997, there was not impossibility of payment, the non payment was arbitrary and willful and the owner had an interest in Maria S.J. on that date.

On April 20, 1998, twenty-five (25) seafarers were not timely paid their wages and on that date, the owner of the M/V Maria S.J. was solvent, there was not impossibility of payment, the non payment was arbitrary and willful and the owner had an interest in Maria S.J. on that date. These 47 seafarers were collectively underpaid

$523,000.00 and are Petitioners herein. The seafarers asserted their claims for payment of these wages, and for delay wages, and asserted their preferred maritime lien for both.

On July 2, 1998, the M/V Maria S.J. was sold at auction by the Marshall. At the time of the Marshall sale, the owner had ceased all operations. However, the sole shareholder and president of the owner, Nikolaos Mazarakis, had executed a personal guarantee guaranteeing payment of the indebtedness secured by the subject mortgage, and at all material times Nikolaos Mazarakis was solvent.[1] The vessel owner, Nikolaos Mazarakis, fully cooperated with the Bank in its foreclosure proceeding in return for the Bank's agreement to forego enforcement and collection on his personal guarantee. On June 2, 1999, the district court rendered judgment in favor of the intervening seamen for unpaid wages and for delay wages pursuant to 46 U.S.C. §10313 arising from the March 24, 1997 and April 20, 1998 non payment of wages. The Judgment for delay wages was rendered *"in personam"* against Golden Lines Shipping, Inc. and thereby judicially determined that the vessel owner failed to pay the seamen within the "prescribed period" without "sufficient cause" as set forth in 46 U.S.C. §10313(f)(g). That Judgment is now final. The summary judgment of the district court and the decision of the Fifth Circuit complained of herein held that while the delay wages were

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[1] Six months before the foreclosure, on September 17, 1997, Nikolaos Mazarakis offered " . . . a first mortgage on real estate worth of U.S.D. 3 million" in return for additional credit of $1 million from the Bank, which offer the Bank declined.

secured by preferred maritime liens, these preferred maritime liens cannot be enforced against the proceeds derived from the sale of the Maria S.J. because of the existence of a subordinate preferred ship mortgage securing a debt of lower priority which exceeds the value of the vessel.

The judgment of the district court complained of herein was entered on November 5, 1998 and held, *inter alia*, that the seamen could maintain their *in rem* claims and that as a matter of law claims for wages and delay wages are entitled to the same preferred maritime lien status. However, the district court, on summary judgment, then dismissed the seamen's *in rem* claims for delay wages reasoning that " . . . the owners lack any real interest in the proceeds of the sale. Consequently, permitting a penalty wage claim against the proceeds would essentially penalize the party other than the owner or master, be it the Bank or some other creditor." On January 19, 1999, the court denied the former crew members' Motion for Reconsideration or New Trial.

During the pendency of the appeal, the District Court rendered judgment on June 2, 1999 in the seamen's favor against the owner in personam and in rem for unpaid wages and in personam for delay wages pursuant to 46 U.S.C. §10313(f)(g), finding that there was no sufficient cause for the non-payment of the wages when due. A judgment quantifying the amount of wages and delay wages due the seamen was signed by the district court on June 14, 1999. The district court's decision of November 5, 1998 dismissing the seamen's in rem claim was affirmed by a divided panel decision of the Court of

Appeals for the Fifth Circuit on April 28, 2000. Rehearing was denied on June 2, 2000.

At no time did the Bank ever prosecute the *in personam* action it filed against Golden Lines Shipping, Inc. (hereinafter the "owner") and the Bank never brought or pursued its *in personam* action against Nikolaos Mazarakis, who was solvent at all times, and was the sole shareholder and president of the owner and the guarantor of the indebtedness to the Bank.

REASONS FOR GRANTING THE WRIT

I. The Fifth Circuit's opinion conflicts with the Ship Mortgage Act which provides that wages are entitled to preferred maritime lien status and are paid with preference and priority over a preferred ship mortgage.

The divided panel decision of the Fifth Circuit mixes apples with oranges by utilizing the legal test for entitlement to delay wages (withholding of wages without sufficient cause, i.e., solvency of vessel owner, interest in vessel) to determine the enforceability of the maritime lien. In this case, the trial court found that the seamen's wages were withheld without sufficient cause (i.e., vessel owner was solvent and had interest in the vessel at the time of withholding) and that the seamen were due delay wages. These delay wages became a maritime lien against the vessel at that point in time under the General Maritime Law and a preferred maritime lien under the Ship

Mortgage Act.[2] The Ship Mortgage Act mandates that these wages be paid with preference and priority over the ship mortgage. Instead of following this mandate of Congress, the court refused to enforce the maritime lien on the basis that the owner had no interest in the proceeds resulting from the judicial sale of the vessel. Lack of interest in the proceeds is only a test for whether the seamen are entitled to delay wages and not a test as to whether a maritime lien should be enforced if such wages are due.

No provision of the Ship Mortgage Act requires that an owner have an "interest" in the proceeds resulting from the vessel sale in order to enforce a maritime lien. If there is sufficient cause for the failure to pay, no delay wages accrue. If there is no sufficient cause for failure to pay, delay wages do accrue. This Court's decision in *Collie v. Fergusson*, 281 U.S. 52 (1930), had nothing to do with the enforcement of liens. *Collie* was a "sufficient cause" case to determine whether or not there was "sufficient cause" for the failure to pay the seafarers' wages. This Court held that when there was insolvency of the ship owner at the time the wages were due (stipulated to in *Collie*) making payment of the wages impossible at the time they were due, there was sufficient cause for the non payment and as such the seafarers were not entitled to penalty wages. This language in *Collie* speaking of the

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[2] The Ship Mortgage Act of 1920, then 46 U.S.C. §911, et seq. was amended by its recodification in 1988 as the Commercial Instruments and Maritime Liens Act, 46 U.S.C. §§31301, et seq. To be consistent with the phraseology of the Fifth Circuit, the Commercial Instruments and Maritime Liens Act will be referred to as "The Ship Mortgage Act".

owner's "interest in his ship" equated a lack of "interest" with having a "sufficient cause" for non payment. In *Collie* the non payment occurred at the same time as the insolvency and the arrest of the vessel. Every Horn Book that has discussed the holding of *Collie* has stated that it stands for the rule that insolvency of the vessel owner and arrest of the vessel, at the time the wages were due, are sufficient cause for non payment of wages, thereby absolving the master/owner for any liability for penalty wages, e.g., Thomas J. Schoenbaum, *Admiralty and Maritime Law*, Vol. 1, Sec. 6.4, p. 247 (2d Ed., 1994) and Martin J. Norris, *The Law of Seamen*, "Sufficient Cause: Arrest of Vessel or Financial Difficulties of the Owner", Vol. 1, Sec. 17:18 at 530-532 (4th Ed., 1985). If there is sufficient cause for the delay or non payment of wages, there is no debt for penalty wages and therefore can be no maritime lien, as there is no debt to secure. If, however, there is *no* sufficient cause for the failure to pay at the time the wages are due, delay wages accrue, and they are secured by a preferred maritime lien.

In many instances, a seafarer's actual employer is neither the master nor the owner of the vessel, but a third party, such as a charterer or concessionaire on a cruise ship. In such cases, as a matter of contract law, the seafarer's *in personam* action is against his actual employer. However in addition to this *in personam* action for wages, whether against the master, the master and owner, or against the charterer or concessionaire or other third party employer, a seafarer has always, as a matter of law, enjoyed the benefit of an in rem action against the vessel itself for his wages, because the wages are entitled to the status of " . . . sacred liens, and, as long as a plank

of the ship remains, the sailor is entitled, against all other persons, to the proceeds as a security for his wages." *The John G. Stevens* 18 Supreme Ct. 544, 170 US 113 (1898). As stated by Professor William Tetley in *Maritime Liens and Claims*, at p. 294 (2d Ed., 1998):

> "Like all preferred maritime liens, seamen's wages rank before mortgage and usually only behind claims in *custodia legis*"
>
> "The seaman has a lien on the vessel no matter who hires him – the owner or the charterer. Thus in *The Edward Peirce* Leibell J. held:
>
> > . . . The employment of the seaman on a vessel gives rise in effect to two relationships; (1) the contractual relationship between the seaman and the operator of the vessel who hires him, whether the operator be the owner or a charterer, and (2) the personal indenture between the seaman and the vessel. Regardless of who the operator of the vessel may be, or on what terms, the personal indenture exists between the seaman and the vessel, and that would seem to be a basis for his right to libel the vessel herself . . . "

Congress statutorily affirmed the holding of *The John G. Stevens* in the Ship Mortgage Act, specifically, 46 U.S.C. §31301(5)(D) which provides that "preferred maritime lien" "means a maritime lien on a vessel" "for wages of the crew of the vessel". Congress then granted these preferred maritime liens preference and priority over a ship mortgage in 46 U.S.C. §31326(b)(1).

Heretofore, there has never been a different standard for *in personam* liability for wages (earned or delayed

wages) against the "master and owner" (or third party employer) and *in rem* liability against the vessel. Heretofore, there never has been a legal barrier to the enforcement of a preferred maritime lien, which exists to secure the *in personam* debt for wages, whether created by the master, owner or third party employer. Heretofore, no court has created a judicial exception for the enforcement of a preferred maritime lien against a vessel for the benefit of a mortgagee in violation of the express provisions of the Ship Mortgage Act and the well established rules of the General Maritime Law regulating the ranking and enforcement of liens.

In *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564 (1982), this Court stated that delay or penalty wages were due upon the satisfaction of two (2), and only 2, conditions;

> "First, the master or owner must have refused or failed to pay the seaman his wages within the periods specified. Second, this failure or refusal must be "without sufficient cause." Once these conditions are satisfied, however, the unadorned language of the statute dictates that the master or owner "shall pay to the seaman" the sums specified "for each and every day during which payment is delayed." Id. at 570.

The panel's decision of April 28, 2000 found *Griffin* to be " . . . not particularly helpful in resolving the issues of this case . . . " because *Griffin* was an *in personam* action, instead of the *in rem* action before this court. The panel cited no authority whatsoever for any difference for the liability *in rem* or *in personam*, for none exists. The *Griffin* case establishes how the delay wage debt arises. *Collie*

was also about how and when the debt does not arise because of "sufficient cause", i.e., insolvency, impossibility of payment, lack of interest in the vessel or proceeds resulting from its sale. The Ship Mortgage Act and the Supplemental Rules for Certain Admiralty and Maritime Claims tell us how the preferred maritime lien securing that a debt is enforced. Rule C specifically provides that an action in rem may be brought "to enforce any maritime lien".

The seafarer's right to a preferred maritime lien for wages derives from the General Maritime Law and was in existence at the time Congress enacted the first delay or penalty wage statute and for each and every revision thereof. Congress, in the Ship Mortgage Act, made the vessel liable for delay wages and earned wages by making them preferred maritime liens. The General Maritime Law has always made the vessel liable for earned wages and this Court has held that delay wages are entitled to the same preference and priority as earned wages. *Collie v. Fergusson, supra*. The wage statute did not take any of the seafarer's lien rights away as evidenced by the *Collie* decision itself. As noted, the wage statute has absolutely nothing to do with enforcement of a maritime lien, other than a statutory basis creating the indebtedness that is then secured by the preferred maritime lien that springs into existence by both the General Maritime Law and the Ship Mortgage Act.

The General Maritime Law granted the seafarer the preferred maritime lien for his wages and the same General Maritime Law held that delay wages are entitled to the exact same lien status and priority of payment as earned wages. The Ship Mortgage Act itself states that

wages are "preferred maritime liens" and further provides that preferred maritime liens shall be paid in preference to a preferred ship mortgage. No provision of the Ship Mortgage Act limits liability for the debt secured by the maritime lien to a vessel's owner or master or their interest in the vessel proceeds; nor does it limit enforcement to an *in personam* action; indeed, the Ship Mortgage Act requires an *in rem* action to enforce this lien and sets forth priority of payment of preferred maritime liens out of the proceeds from the sale of the vessel. Nowhere does the Ship Mortgage Act limit enforcement of a preferred maritime lien against the "owner's interest" in the vessel; indeed, maritime liens follow the vessel even after the "owner" no longer owns it! *The Nestor,* 18 Fed. Case 9, Case No. 10,126 (C.C.D. ME 1831); *The Bold Buccleugh 7 Moore* (P.C.) 267 (1851).

The divided panel in its April 28, 2000 decision recognized that the seafarer's preferred maritime lien is created by operation of law against the vessel itself for any wages due or for any delay or penalty wages, but erroneously held that enforcement of this vested property right by the seamen depends upon the financial condition of the vessel owner at the time of the judicial sale. This decision creates serious, far reaching, and unintended results. The rationale of the appellate court in denying the seafarers enforcement of their preferred maritime lien *in rem* for their wages is just as applicable to other claims against "the owner" that heretofore were secured as preferred maritime liens to be paid with preference and priority such as necessaries, tort claims and breach of charter agreements.

A "preferred maritime lien" refers to a maritime lien on a vessel, and they are statutorily defined by 46 U.S.C. §31301(5)(B) to including " . . . wages of the crew of the vessel." Congress specifically provided in 46 U.S.C. §31326(b)(1) that these preferred maritime liens have priority over a preferred ship mortgage. Congress stressed the importance of the seafarer's lien for wages in 46 U.S.C. §10317 by providing that "A master or seaman . . . may not forfeit the master or seaman's lien on the vessel or be deprived of a remedy to which the master or seaman otherwise would be entitled for the recovery of wages." The divided panel has undone the statutory scheme by penalizing the holders of the preferred maritime lien for the crew wages. By doing so, it seems to have also made it impossible for all other preferred maritime lien holders with claims against "the owner" to be able to enforce their liens against the proceeds of the sale of a vessel in instances when a preferred ship mortgage exists with a debt which is greater than the sales proceeds.[3] The divided panel has created by judicial fiat that which Congress clearly and statutorily established otherwise.

The decision of this court obviously allows the ship owner to avoid the coercive effect of the delay wage statute, exactly the opposite of the court's intended result. Only the ship owner benefits from the decision of the divided panel. The Bank will obtain its mortgage debt

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[3] This will always be the case in the case with a fleet mortgage, whereby a vessel owner mortgages several vessels under one mortgage. The aggregate amount due will virtually always exceed the value of any one vessel.

from the sales proceeds of the vessel, and the ship owner will not have to pay to the Bank any deficiency from its other assets, its guarantees, or its other collateral because of its deal to cooperate in exchange for release of the guarantors. Mr. Mazarakis gets to keep his $3 million of commercial property, his villas, his yacht and other trappings of wealth. The decision encourages collusion between the mortgagees and shipowners. The shipowner benefits in the same dollar amount that the seafarers do not collect for their delay wage claim. The decision of the divided panel misapplies *Collie* and *Griffin* and judicially erases away the coercive effect of the clear statutory scheme established by Congress.

CONCLUSION

At the time of the enactment of the first delay wage statute in 1872, and at the time of each and every revision, the General Maritime Law gave rise to a preferred maritime lien for wages against the vessel, by operation of law, regardless of who was responsible for the wage payment – owner, master, charterer, operators or other third party. Congress is presumed to be aware of settled judicial interpretations. See *Keene Corp. v. United States*, 508 U.S. 200, 212 (1993). Congress obviously desired to allow enforcement of wage liens with priority against vessel sale proceeds as evidenced by the express language contained in the Ship Mortgage Act. In the instant case the district court ultimately found that there was "no sufficient cause" for the $523,000.00 wage underpayment to the 47 seafarers, but only entered judgment for *in personam* liability for delay wages, having previously

denied enforcement of the seamen's preferred maritime lien in the summary judgment subject of the Fifth Circuit court decision.

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted:

RICHARD J. DODSON, Bar Roll 4982
LAW OFFICE OF RICHARD J. DODSON
A Professional Corporation
628 North Boulevard
Baton Rouge, Louisiana 70802
Telephone (225) 344-0633

– and –

MICHAEL A. COLOMB, Bar Roll 1035
W. STEVEN MANNEAR, Bar Roll 9098
POYNTER, MANNEAR & COLOMB
A Professional Law Corporation
628 North Boulevard
Baton Rouge, Louisiana 70802
Telephone (225) 344-6733

Attorneys for Petitioners

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 99-30102

THE GOVERNOR AND COMPANY OF THE BANK OF SCOTLAND,

Plaintiff-Appellee,

versus

HECTOR SABAY; VOLODYMYR SCHEVCHUK; NORMAN SOLIS; NOEL SOMOSIERRA; GERRY SUYAT, ET AL.,

Intervenors-Appellants,

versus

MARIA S.J. MV, her engines, tackle, lifeboats, anchor, chain, equipment and appurtenances, in rem, ET AL.,

Defendants.

Appeal from the United States District Court for the Eastern District of Louisiana

(Filed Apr. 28, 2000)

Before JONES, BARKSDALE and DENNIS, Circuit Judges.[1]

RHESA HAWKINS BARKSDALE, Circuit Judge:

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[1] Judge Dennis reserves the right to file an opinion.

For this 28 U.S.C. § 1292(a)(3) interlocutory appeal, the issue is one of first impression: can a seaman's preferred maritime lien for 46 U.S.C. § 10313(g) "penalty" wages be enforced against the proceeds from the sale of the vessel on which he served, when those proceeds are less than the indebtedness secured by a preferred mortgage for the vessel, and in the light of the plain language of the penalty wages statute, which imposes liability on *only* the vessel's master or owner (if wages *not* paid within specified time "without sufficient cause, the *master or owner* shall pay to the seaman 2 days' wages for each day payment is delayed") (emphasis added). The district court held the lien could *not* be enforced. We **AFFIRM**.

I.

On 30 July 1996, Golden Lines Shipping, Inc., owner of the M/V MARIA S.J., and Golden Mediterranean Lines, Inc., owner of the M/V NINA S, were loaned approximately $15 million by the Governor and Company of the Bank of Scotland. The loan amount was *not* to "exceed . . . 70% of the [vessels'] aggregate market value", with a satisfactory valuation for each being required; Golden Lines was to notify the Bank when any legal action, likely to have a material adverse effect on Golden Lines or the operation of its vessel, was either threatened or instituted; and the Bank received a first preferred ship mortgage on each vessel.

In the mortgage, Golden Lines covenanted that it would, *inter alia*, "promptly pay and discharge all debts, damages and liabilities whatsoever which have given or may give rise to maritime or possessory liens on or claims

enforceable against" the MARIA, and "furnish satisfactory evidence that the wages . . . of the . . . crew are being regularly paid".

In addition to the mortgages, security for the loan included the assignment of proceeds from charter party agreements covering the MARIA and NINA, and a personal guarantee from Nikolaos Mazarakis, president and sole shareholder of Golden Lines, who was also the manager of Kosmas Marine Line, Inc., which managed the MARIA, NINA, and M/V NORSE TRADER. (The NORSE TRADER, owned by Konim Shipping Co., Ltd., was subject to a separate loan agreement and mortgage in favor of the Bank.)

In March 1997, while the MARIA was in the Mississippi River in Louisiana, its seamen complained about being underpaid and retained counsel. Following negotiations with Golden Lines, a settlement agreement was reached later that month.

As consideration for the seamen *not* having the vessel arrested, Golden Lines agreed, *inter alia*, to make a partial payment that day against the wage arrearage, with the balance to be paid at the next port of call (Houston, Texas). Golden Lines stipulated that, if the agreement was *not* satisfied punctually, it was in violation of 46 U.S.C. § 10313 (penalty wages) as of 24 March 1997, the day of the settlement, "and that *penalty wages shall commence to run* as of" that date. (Emphasis added.) Golden Lines failed to pay the wages due.

On 30 March 1998, approximately a year after the wages-settlement, the Bank issued notices of default for the loans secured by the three vessels. On 7 April, in

response to Mazarakis' request for release from his personal guarantees for the loans secured by those vessels, the Bank advised that release would be recommended *if* he cooperated in their arrest and sale.

The MARIA re-entered the Mississippi River in the spring of 1998. All on 22 April, the seamen aboard filed an unpaid wages action in Louisiana state court against Golden Lines and Kosmas Marine Line; the court issued a writ of attachment; and the MARIA was taken into the custody of the sheriff.

Five days earlier, on 17 April, the Bank had filed a complaint in federal court against the MARIA, *in rem*, and Golden Lines, *in personam*, to foreclose its mortgage on the vessel. That same day, the district court issued an arrest warrant for the vessel; it was served on 29 April. In mid-May, Kosmas Marine Line and Golden Lines removed the seamen's state court action to federal court, where it was consolidated with the Bank's foreclosure proceeding.

That May, the Bank paid the wages owed the seamen aboard the MARIA at the time of arrest, and they were repatriated; the Bank took an assignment of their wage liens. Seamen still claimed to be owed *past due wages* in excess of $250,000. (As discussed *infra*, such wages were paid from the sale proceeds a year later, in May 1999.)

In June 1998, the seamen filed a complaint in intervention in the Bank's foreclosure proceeding, seeking to enforce maritime liens against the vessel for unpaid wages *and penalty wages for each day of delay in payment of earned wages.*

That July, the MARIA was sold at a judicial auction to the Bank, which bid $3.7 million. The Bank agreed to satisfy any liens determined to have priority over the mortgage, up to the amount of sale proceeds, less *custodia legis* expenses. (The prior month, the NINA had been sold at auction; that September, the Bank received approximately $3.6 million from the sale proceeds.)

The MARIA seamen asserting penalty wages liens consist of two groups: (1) 22 serving on 24 March 1997, covered by the settlement agreement of that date with Golden Lines; and (2) 25 serving on 20 April 1998, the day they formally demanded payment of past-due wages, two days prior to filing the state court action.

The Bank's motion for partial summary judgment was granted in part. The court ruled that: the seamen had preferred maritime liens for wages and penalty wages; the latter had the same priority as the former; the wages liens were entitled to priority over the Bank's preferred ship mortgage; *but*, the seamen could *not* enforce their penalty wages liens against the vessel sale proceeds. The court reasoned that: the vessel's master and owner had *no* interest in those proceeds, because the amount owed the Bank exceeded that realized from the sale; and permitting a penalty wages claim against the proceeds was the functional equivalent of allowing the claim against a party other than the master or owner, contrary to the penalty wages statute, which expressly imposes liability only against them. *See* 46 U.S.C. § 10313(g).

In June 1999, after this appeal was filed, the district court granted the seamen summary judgment against Golden Lines, *in personam*, and the MARIA, *in rem*, for

approximately $261,000 in unpaid wages, plus pre-judgment interest. The unpaid wages lien was satisfied from the vessel sale proceeds. (Therefore, penalty wages ceased when those wages were paid.) In addition, the seamen's unopposed summary judgment motion against Golden Lines, *in personam*, for penalty wages of approximately $7 million was granted.[2]

II.

The seamen contend that the district court erred in holding they *cannot* enforce their preferred maritime lien for penalty wages against the MARIA sale proceeds, without determining whether, when the wages were due, Golden Lines had "sufficient cause" for their non-payment; and in failing to consider evidence that the Bank failed to mitigate its losses by *not* enforcing guarantees securing the loan.[3] The Bank counters that allowing the

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[2] The *in personam* judgment against Golden Lines is, in all likelihood, uncollectible. At a hearing in December 1998, its counsel stated that the corporation no longer existed, because it had *no* assets and was conducting *no* operations. And, in January 1999, its counsel was allowed to withdraw, having advised the court that Golden Lines had advised him that, as a result of its severe financial condition, it would cease all operations.

[3] The seamen also contend, *for the first time on appeal*, that the Bank's claim should be equitably subordinated to their penalty wages liens, claiming the Bank's collusive conduct with Mazarakis conferred an unfair advantage on the Bank and harmed the seamen, who, unlike the Bank, had no other security from which to obtain satisfaction of their liens. Because this claim was *not* presented in district court, the seamen must show the existence of a plain error that affected their substantial

seamen to recover penalty wages from the sale proceeds would violate the Due Process Clause of the Fifth Amendment and create conflicts between Supreme Court decisions and between the penalty wages statute and the Ship Mortgage Act, while *not* advancing Congress' intent to impose penalty wages liability only on vessel masters or owners.

A summary judgment is reviewed *de novo*, using the standard applied by the district court. *E.g.*, ***Forsyth v. Barr***, 19 F.3d 1527, 1533 (5th Cir.), *cert. denied*, 513 U.S. 871 (1994). Such judgment is mandated when the summary judgment record, viewed in the light most favorable to the non-movant, reveals that "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law". FED. R. CIV. P. 56(c);

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rights, and also must persuade us to exercise our discretion to correct it. *See* ***Highlands Ins. Co. v. National Union Fire Ins. Co.***, 27 F.3d 1027, 1032 (5th Cir. 1994), *cert. denied*, 513 U.S. 1112 (1995). They have *not* done so. *Cf.* ***Custom Fuel Servs., Inc. v. Lombas Indus., Inc.***, 805 F.2d 561, 566-67 (5th Cir. 1986) (applying equitable subordination to subordinate Bank's preferred ship mortgage to claims of other maritime lienors where bank transferred title to vessel to its wholly owned, undercapitalized subsidiary and took preferred ship mortgage, and bank controlled subsidiary, using it as mere instrumentality to accomplish lease of vessel to charterer).

Even assuming that the issue was preserved by the seamen, through their contention in district court that, prior to foreclosing on the mortgage, the Bank should have been required to mitigate its losses by enforcing its other security interests, including Mazarakis' personal guarantee, the district court did *not* err by rejecting it. Neither the statutes nor the terms of the mortgage condition the Bank's right to foreclose on its pursuing other means of repayment.

Forsyth, 19 F.3d at 1533. Resolution of this issue of first impression requires an examination of the language, history, and purposes of the penalty wages statute, 46 U.S.C. § 10313(g), and the Ship Mortgage Act, 46 U.S.C. §§ 31301-31343, as well as the jurisprudence interpreting them.

A.

In truth, no authority really need be cited for the fact that seamen, the "wards of admiralty", historically have received favored treatment from the Congress and the admiralty courts. *See* ***Bainbridge v. Merchants' & Miners' Transp. Co.***, 287 U.S. 278, 282 (1932) ("Seamen have always been regarded as wards of the admiralty, and their rights, wrongs, and injuries a special subject of the admiralty jurisdiction. The policy of Congress, as evidenced by its legislation, has been to deal with them as a favored class." (citation omitted)); ***Hume v. Moore-McCormack Lines***, 121 F.2d 336, 340-41 & n.13 (2d Cir.) (discussing historical background of judicial solicitude for seamen's rights, including the writings of Lord Stowell and Justice Story), *cert. denied*, 314 U.S. 684 (1941); *see also* 1B BENEDICT ON ADMIRALTY, § 61, at 5-1 (7th ed. 1997); THOMAS J. SCHOENBAUM, ADMIRALTY AND MARITIME LAW, Vol. 1, § 6-1, at 239 (2d ed. 1994) ("The protection of seamen was one of the principal reasons for the development of admiralty as a distinct branch of law."); MARTIN J. NORRIS, THE LAW OF SEAMEN, Vol. 1, § 12:1, at 424-26 (4th ed. 1985).

Legislation enacted for seamen's benefit is to be liberally construed in their favor. *See* ***Isbrandtsen Co. v. Johnson***, 343 U.S. 779, 782 (1952) ("Whenever congressional

legislation in aid of seamen has been considered here since 1872, this Court has emphasized that such legislation is largely remedial and calls for liberal interpretation in favor of the seamen."); ***Bainbridge***, 287 U.S. at 282 (statutes enacted for seamen's benefit should be liberally construed).

This applies to statutes concerning their wages. ***Arguelles v. U.S. Bulk Carriers, Inc.***, 408 F.2d 1065, 1070 (4th Cir. 1969) ("The wage statutes are to be liberally construed in favor of the seaman."), *aff'd*, 400 U.S. 351 (1971). It also holds true for penalty wages. ***Forster v. Oro Navigation Co.***, 228 F.2d 319, 319-20 (2d Cir. 1955) (penalty wages "statute, designed to protect seamen, must be liberally interpreted for their benefit"); 1B BENEDICT ON ADMIRALTY, § 66, at 5-16 ("[The penalty wages] statute, like most other statutes protecting the rights of seamen, is liberally construed by the courts.").

The rationale for such concern about seamen's wages was stated in ***The David Pratt***, 7 F. Cas. 22, 25 (D. Me. 1839):

> Seamen are not a class of men who ordinarily make provision against the future. On their return from a voyage they are usually dependent on their wages for present support, and if they are withheld they ordinarily find themselves in a state of entire destitution, not only without present means to provide for their immediate and most pressing necessities, but without credit.

Our court has stated that "[w]ages due seamen are given utmost protection by admiralty courts". ***First Nat'l Bank of Jefferson Parish v. M/V Lightning Power***, 776 F.2d

1258, 1262 (5th Cir. 1985); *see also* ***Brandon v. S.S. Denton***, 302 F.2d 404, 416 (5th Cir. 1962) ("Wages of seamen occupy a unique status. The statutory provision extending them the protection of a preferred maritime lien is deeply rooted in history.").

Seamen's wages were the subject of legislation enacted by the first Congress, giving seamen the right to collect their wages "as soon as the voyage is ended". Act of July 20, 1790, ch. 29, § 6, 1 Stat. 133-34. And, Congress established penalty wages approximately 80 years later, in 1872: a master or owner neglecting or refusing to timely pay a seaman's wages as specified in the statute "*without sufficient cause* shall pay to the seaman a sum not exceeding the amount of two days' pay for each of the days, not exceeding ten days, during which payment is delayed . . . ; and such sum shall be recoverable as wages in any claim made before the court". Shipping Commissioners Act of 1872, ch. 322, § 35, 17 Stat. 269 (emphasis added).

The 1790 and 1872 statutes were the basis for § 4529 of the Revised Statutes, which contained language substantially identical to that in the 1872 statute. REV. STAT. § 4529 (2d ed. 1878). In 1898, when the statute was amended, Congress eliminated the ten-day limitation for penalty wages, but decreased the penalty from two to one day's pay for each day of delay. Act of Dec. 21, 1898, ch. 28, § 4, 30 Stat. 756 ("[e]very master or owner who refuses or neglects to make payment in manner hereinbefore mentioned without sufficient cause shall pay to the seaman a sum equal to one day's pay for each and every day during which payment is delayed beyond the respective periods"). In 1915, the penalty was doubled to the present

two days' pay for each delay-day. Seamen's Act of 1915, ch. 153, § 3, 38 Stat. 1164-65, codified at 46 U.S.C. § 596.

The language at issue was amended for the last time in 1983, when the maritime laws were recodified. *See* Pub. L. No. 98-89, 97 Stat. 566 (1983). The current version, found in 46 U.S.C. § 10313, provides, in pertinent part:

> (f) At the end of a voyage, the master shall pay each seaman the balance of wages due the seaman within 24 hours after the cargo has been discharged or within 4 days after the seaman is discharged, whichever is earlier. When a seaman is discharged and final payment of wages is delayed for the period permitted by this subsection, the seaman is entitled at the time of discharge to one-third of the wages due the seaman.
>
> (g) When payment is *not* made as provided under subsection (f) of this section *without sufficient cause*, the *master or owner* shall pay to the seaman 2 days' wages for each day payment is delayed.
>
> . . . .
>
> (i) This section applies to a seaman on a foreign vessel when in a harbor of the United States. The courts are available to the seaman for the enforcement of this section.

(Emphasis added.)

As described in numerous opinions, penalty wages are "to secure prompt payment of seamen's wages . . . and thus to protect them from the harsh consequences of *arbitrary and unscrupulous action of their employers*, to which, as a class, they are peculiarly exposed". *Collie v.*

Fergusson, 281 U.S. 52, 55 (1930) (emphasis added). That purpose was to be accomplished "by the imposition of a liability which is not exclusively compensatory, but designed to prevent, by its coercive effect, arbitrary refusals to pay wages, and to induce prompt payment *when payment is possible*". ***Id.*** at 55-56 (emphasis added).[4]

As discussed ***infra,*** a seaman has a maritime lien for penalty wages. The maritime lien is "a unique security device, serving the dual purpose of keeping ships moving in commerce while not allowing them to escape their debts by sailing away". ***Equilease Corp. v. M/V Sampson,*** 793 F.2d 598, 602 (5th Cir.) (en banc), *cert. denied,* 479 U.S. 984 (1986).

> The lien is a special property right in the vessel, arising in favor of the creditor by operation of law as security for a debt or claim. The lien arises when the debt arises, and grants the creditor the right to appropriate the vessel, have it

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[4] *See also* ***Henry v. S/S Bermuda Star,*** 863 F.2d 1225, 1240 (5th Cir. 1989) ("more recently the Supreme Court has emphasized that Congress sought to prevent the unjust enrichment *of shipowners* who denied seamen wages and benefits rightfully earned" (emphasis added)); ***Chung, Yong Il v. Overseas Navigation Co.,*** 774 F.2d 1043, 1049 (11th Cir. 1985) (purpose of statute "is to provide for the prompt payment of wages to a discharged seaman . . . and to ensure that a seaman is *not* turned ashore with little or no money" (emphasis added)), *cert. denied,* 475 U.S. 1147 (1986); ***Mavromatis v. United Greek Shipowners Corp.,*** 179 F.2d 310, 315 (1st Cir. 1950) ("[t]hese paternalistic provisions in favor of seamen . . . were designed to protect from overreaching a generally impecunious and improvident class of persons, and to insure that seamen will not be turned ashore with little or nothing").

> sold, and be repaid the debt from the proceeds. . . . Thus the maritime lien may be defined as a property right that adheres to the vessel wherever it may go. . . . Such a lien has been held to follow the vessel even after it is sold to an innocent purchaser. . . . The maritime lien is a lien on the vessel, and only indirectly, inasmuch as it conflicts with the owner's rights in the vessel, it is connected with the owner. . . . The maritime lien concept thus somewhat personifies a vessel as an entity with potential liabilities independent and apart from the personal liability of its owner.

Id. (internal quotation marks and citations omitted).

Under the common law, seamen had a maritime lien against the vessel to secure their wages, enforceable by an action *in rem*. *See* ***Leon v. Galceran,*** 78 U.S. (11 Wall.) 185, 187 (1870); ***Sheppard v. Taylor,*** 30 U.S. (5 Pet.) 675, 709-10 (1831); ***Irving Trust Co. v. The Golden Sail,*** 197 F. Supp. 777, 779 (D. Or. 1961) ("It is legend that the unpaid 'wages of the crew' is a libel against the vessel in rem.").

Moreover, under the Ship Mortgage Act, as discussed *infra*, seamen's wages liens are "preferred maritime liens", having priority over preferred ship mortgages. *See* 46 U.S.C. § 31326(b)(1); ***M/V Lightning Power,*** 776 F.2d at 1262; ***Brandon,*** 302 F.2d at 415; ***Crabtree v. The SS Julia,*** 290 F.2d 478, 482 (5th Cir. 1961); ***Scrofani v. Miami Rare Bird Farm, Inc.,*** 208 F.2d 461, 464 (5th Cir. 1953); ***United States v. ZP Chandon,*** 889 F.2d 233, 237 (9th Cir. 1989).

The reasons for the seamen's wages lien include the following:

> The ship may be the only valuable security on which the seamen can rely. The seaman is the traditional ward of the admiralty court. Finally, without the seaman's efforts in bringing the ship safely to port, there would be no res against which other creditors could assert claims.

International Paint Co. v. M/V Mission Viking, 637 F.2d 382, 385 (5th Cir. 1981); *see also* NORRIS, THE LAW OF SEAMEN, Vol. 1, § 20:7, at 584-85.

Like other maritime liens, a seaman's wages lien, as noted, is enforceable in an action in rem. *See* FED. R. CIV. P. SUPPLEMENTAL RULE FOR CERTAIN ADMIRALTY & MARITIME CLAIMS (C)(1) ("An action in rem may be brought . . . [t]o enforce any maritime lien"); ***Riffe Petroleum Co. v. Cibro Sales Corp.***, 601 F.2d 1385, 1389 (10th Cir. 1979). And, as discussed, a maritime lien "arises when the debt arises, and grants the creditor the right to appropriate the vessel, have it sold, and be repaid the debt from the proceeds". ***Equilease***, 793 F.2d at 602; *see also* NORRIS, THE LAW OF SEAMEN, Vol. 1, § 20:2, at 578 ("The maritime lien is a privileged claim giving to the creditor a special right in the ship which arises from the moment when the claim attaches and which he can enforce by an action *in rem*, *i.e.*, having the ship sold so that the debt might be paid out of the proceeds of the sale."); SCHOENBAUM, ADMIRALTY AND MARITIME LAW, Vol. 1, § 9-1, at 490 ("A maritime lien arises from the moment of the service or occurrence that provides its basis.").

Seamen's wages liens have been referred to as "sacred" liens:

> Wages of seamen occupy a unique status. The statutory provision extending them the protection of a preferred maritime lien is deeply rooted in history. Seamen's wages, "according to the favorite saying of Lord Stowell and of Mr. Justice Story, are sacred liens, and, as long as a plank of the ship remains, the sailor is entitled, against all other persons, to the proceeds as a security for his wages." The statutes throw around seamen's wages most definite, detailed, and stringent protections from faraway *owners* of vessels, from *shipmasters*, and from the seaman himself. . . .

Brandon, 302 F.2d at 416 (quoting ***The John G. Stevens***, 170 U.S. 113, 119 (1898)) (emphasis added). Accordingly, a maritime lien for seamen's wages is not subject to any filing or recording requirements. ***ZP Chandon***, 889 F.2d at 238.

Several courts (including the district court in this case) have ruled not only that seamen also have a maritime lien for penalty wages, *see* ***The Great Canton***, 299 F. 953 (E.D.N.Y. 1924) (rejecting contention that seaman's entitlement to penalty wages is only against master or owner and not a lien against the vessel), but also that the penalty wages lien has the same priority as one for earned wages. *See* ***Collie***, 281 U.S. at 54 ("[t]he claim for double wages which, when valid, is by the terms of the statute 'recoverable as wages,' has been held to be embraced in the seaman's lien for wages, with priority

over other liens, and governed by the procedure applicable to suits for the recovery of seamen's wages"); *Peterson v. S.S. Wahcondah*, 331 F.2d 44, 48 (5th Cir. 1964) (quoting *Collie* for proposition that penalty wages lien has same priority as wages lien).[5]

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[5] *See also* *Chung, Yong Il*, 774 F.2d at 1049 ("the penalty wage provision is fully consistent with the notion that a seaman has a 'sacred lien' against a vessel for his earnings"); *Buckley v. Oceanic S.S. Co.*, 5 F.2d 545, 546 (9th Cir. 1925) (because penalty wages claim "is for extra wages as incidental to the wages proper, it stands upon no different basis than does the claim for wages proper"); *Gerber v. Spencer*, 278 F. 886, 889 (9th Cir. 1922) (penalty wages are "an incident to the claim of wages proper" and lien has same priority as lien for earned wages); *Peterson v. S.S. Wahcondah*, 235 F. Supp. 698, 700 (E.D. La. 1964) (on remand: "[t]he seamen's lien for penalty wages is accorded the same sacred priority as the lien for wages, and attaches to proceeds from both the sale of the vessel and the earned 'freight' "); *The Chester*, 25 F.2d 908, 910 (D. Md. 1928) ("[M]oney payable . . . as [penalty] wages . . . is payable essentially as wages, and not penalties. . . . [I]t is axiomatic that seamen have a lien upon the vessel for their wages. Thus it follows that they must also have a lien for any and all sums payable under [the penalty wages statute], and not merely a right to enforce a personal claim against the master or owner."); *The Fort Gaines*, 18 F.2d 413, 414 (D. Md. 1927) (penalty wages lien has same priority as lien for wages); *Feldman v. American Palestine Line, Inc.* (*The President Arthur*), 25 F.2d 1002, 1002-03 (S.D.N.Y. 1926) ("the law is settled . . . that extra pay allowed under [the penalty wages statute], is an incident to wages proper, is recoverable as wages, and ranks with wages as a prior lien"); *The Trader*, 17 F.2d 623, 625 (E.D.S.C. 1926) (Penalty wages "are an incident to and a part of the actual wages, just as much as interest is an incident to and a part of a debt. They are intended as compensation for the delay in payment, and, inasmuch as they are an incident to and a part of the wages, they will constitute a maritime lien on the vessel, the

In district court, the Bank noted that the current penalty wages statute does *not* include the following language found in the provisions first enacted in 1872 and repeated in each version preceding the current one: "which sum shall be recoverable as wages in any claim made before the court". Accordingly, it urged there was no longer any basis for a penalty wages lien having the same priority as one for earned wages.

We agree with the district court's rejection of this contention, for two reasons. First, the current statute describes the penalty as "2 days' *wages*", 46 U.S.C. § 10313(g) (emphasis added), rather than, as in its predecessors, "a sum equal to two days' pay . . . , which sum shall be recoverable as wages". *See* Seamen's Act of 1915, ch. 153, § 3, 38 Stat. 1164-65. Second, the legislative history reflects that no change in the substantive law was intended. *See* S. REP. 98-56, 98th Cong., 1st Sess. 1, 10 (1983) ("There are no substantive changes of a controversial nature intended to be made by this bill. . . . In a codification statute, . . . no change in law is intended unless clearly expressed.").

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same as wages."); The Chas. L. Baylis, 25 F. 862, 863 (S.D.N.Y. 1885) (penalty wages are "an incident to . . . claim of wages proper, and rank[ ] with . . . wages as a prior lien"); *Cox v. Lykes Bros.*, 143 N.E. 226, 227 (N.Y. 1924) (in penalty wages statute, "Congress, imposing a liability for the benefit of seamen, has put it on the same plane as a liability for wages, and has said that the two shall be enforceable together"); *cf. Covert v. The British Brig Wexford*, 3 F. 577, 578-79 (S.D.N.Y. 1880) (interpreting British merchant shipping act's penalty wages provision as providing lien for penalty wages with same priority as wages lien).

B.

Prior to the enactment in 1920 of the Ship Mortgage Act (now codified at 46 U.S.C. §§ 31301-31343), a ship mortgage was *not* a maritime contract and was *not* within admiralty jurisdiction. *See* ***The Thomas Barlum***, 293 U.S. 21, 32 (1934); ***Bogart v. The John Jay***, 58 U.S. (17 How.) 399, 402 (1854); ***Brandon***, 302 F.2d at 412. Accordingly, "mortgage security on ships was practically worthless", ***Barlum***, 293 U.S. at 39 (internal quotation marks and citations omitted), because "ship mortgages were *not* entitled to enforcement by maritime liens and were subordinate to all of the many maritime liens a ship might incur". ***Long Island Tankers Corp. v. S.S. Kaimana***, 265 F. Supp. 723, 725 (N.D. Cal. 1967) (emphasis added), *aff'd*, 401 F.2d 182 (9th Cir. 1968), *cert. denied*, 393 U.S. 1095 (1969); *see also* 2 BENEDICT ON ADMIRALTY, § 69a, at 6-18 – 6-21 (discussing history and purpose of Ship Mortgage Act).

The Ship Mortgage Act was intended to remedy this problem. It was to "provide for the promotion and maintenance of the American merchant marine", by making ship mortgagees more secure than under the existing law. ***Long Island Tankers***, 265 F. Supp. at 725.[6]

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[6] *See also* ***Custom Fuel Servs.***, 805 F.2d at 568 ("[t]he primary purpose of the Ship Mortgage Act is to induce private capital to invest in shipping"); ***Equilease***, 793 F.2d at 602 ("History shows that the merchant marine industry was faltering in 1910; Congress passed the Act in an attempt to spur incentive for the financing of shipowners by making private investment in shipping more attractive than it had been."); ***First Nat'l Bank & Trust Co. of Escanaba v. Oil Screw Olive L. Moore***, 379 F. Supp. 1382, 1390 (W.D. Mich. 1973) ("Clearly the policy of the Ship Mortgage Act was to spur incentive for the

Under the Ship Mortgage Act, a valid ship mortgage meeting the requirements of 46 U.S.C. § 31322 is a "preferred mortgage", which "is a lien on the mortgaged vessel in the amount of the outstanding mortgage indebtedness secured by the vessel". 46 U.S.C. § 31325(a). Upon default, the mortgagee may, *inter alia*, "enforce the preferred mortgage lien in a civil action in rem". 46 U.S.C. § 31325(b)(1).

When a vessel is sold to enforce either a preferred mortgage lien or a maritime lien, all claims *in the vessel* are terminated. 46 U.S.C. § 31326(a). But, such terminated claims "attach[ ], in the same amount and in accordance with their priorities to the proceeds of the sale". 46 U.S.C. § 31326(b).[7]

A preferred ship mortgage "has priority over all claims against the vessel (*except for* expenses and fees allowed by the court, costs imposed by the court, and *preferred maritime liens*)". 46 U.S.C. § 31326(b)(1) (emphasis added). And, of particular interest here, a "preferred maritime lien" includes "a maritime lien on a vessel . . . for wages of the crew of the vessel". 46 U.S.C.

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financing of shipowners in an effort to strengthen a faltering merchant marine."), *aff'd*, 521 F.2d 1401 (6th Cir. 1975).

[7] *See also* ***Sheppard***, 30 U.S. (5 Pet.) at 710 (seamen's wages lien attaches to proceeds of vessel); ***Barlum***, 293 U.S. at 35 ("on foreclosure and sale in admiralty, all pre-existing claims in the vessel are to be held terminated and thereafter are to attach to the proceeds of the sale"); ***American Bank of Wage Claims v. Registry of Dist. Ct. of Guam***, 431 F.2d 1215, 1218 (9th Cir. 1970) ("The proceeds from the judicial sale of a vessel, or security furnished in lieu thereof, are deemed a jurisdictional substitute for the vessel itself.").

§ 31301(5)(D). In ***Kopac Int'l, Inc. v. M/V Bold Venture,*** 638 F. Supp. 87, 90 (W.D. Wash. 1986), the court reasoned that wages liens were given priority over a preferred ship mortgage "generally because these liens must be favored to ensure that the vessel is kept moving in trade . . . [and such priority] serves indirectly to protect the mortgagee's interests because the mortgagee wants the vessel to operate".

C.

For the precise factual context at issue, we have found *no* cases applying the penalty wages statute and the Ship Mortgage Act. The plain language of the penalty wages statute imposes liability *only* on the "master or owner"; the jurisprudence interpreting it gives seamen a maritime lien against the vessel for such wages, which attaches at the moment earned wages are *not* timely paid pursuant to the statute; and the plain language of the Ship Mortgage Act gives wages liens preferred status, including priority over a preferred ship mortgage. But, on sale of the vessel, can that penalty wages lien be enforced against the proceeds *if* they are less than the amount secured by the preferred ship mortgage, so that *no* interest is then held by the owner, the entity liable under the plain language of the penalty wages statute?

The district court agreed with the Bank that penalty wages liens are *not* enforceable against the proceeds *unless* the owner has an interest in them *at the time of attempted enforcement of the penalty wages lien.* Because Golden Lines' indebtedness, secured by the Bank's preferred ship mortgage, exceeded the sale proceeds, the

court concluded that the seamen could *not* recover penalty wages from them, *because Golden Lines had no interest in them.*

The seamen contend that, instead, the court should have focused on whether the owner had an interest in the vessel *at the time the penalty wages lien attached*; in other words, in the language of the statute's subpart (g), whether the owner had "sufficient cause" for nonpayment of earned wages when they became due. *See* 46 U.S.C. § 10313(g).

As discussed, it is well-settled that a maritime lien "creates an interest in the vessel, and the vessel itself, as an entity apart from its owner, may be seized and held liable to enforce the lien". ***Merchants Nat'l Bank of Mobile v. Dredge Gen. G.L. Gillespie,*** 663 F.2d 1338, 1345 (5th Cir. 1981), *cert. dismissed,* 456 U.S. 966 (1982). Justice Story stated in ***The Nestor,*** 18 F. Cas. 9 (D. Me. 1831):

> The lien for seamen's wages attaches ordinarily on the ship during the voyage, although no wages are strictly due until the end of the voyage. A sale of the ship, pending the voyage, would not defeat this inchoate lien; and when the voyage was completed, the lien would have relation back to the commencement of the voyage.

Id. at 14.

Subsequent cases are, of course, to the same effect. *See* ***The John G. Stevens*** 170 U.S. at 117 ("a maritime lien is created as soon as the claim comes into being"); ***McCrea v. United States,*** 294 U.S. 23, 32 (1935) ("[L]iability for double wages accrues, if at all, from the

end of the period within which payment should have been made. It must be determined by the happening of an event within the period, failure to pay wages without sufficient cause."); ***Equilease***, 793 F.2d at 602 ("[maritime] lien arises when the debt arises").

And, under our precedent, a penalty wages lien has the same priority as a wages lien. ***Peterson***, 331 F.2d at 48. The penalty wages lien attached to the vessel when, without sufficient cause, Golden Lines failed to timely pay the wages.

Pursuant to the Ship Mortgage Act, that lien was terminated by the judicial sale of the vessel, 46 U.S.C. § 31326(a). But, it attached to the sale proceeds, as a preferred maritime lien with priority over the Bank's preferred ship mortgage. 46 U.S.C. §§ 31301(5)(D), 31326(b)(1).

Language in several cases supports the seamen's contention that the owner's interest in the vessel should be determined when the penalty wages lien attaches, rather than later, on attempted lien enforcement. *See* ***Alier v. Sea Land Serv., Inc.***, 465 F. Supp. 1106, 1110 (D.P.R. 1979) ("the essential spirit and purpose of the [penalty wages] statute is to financially punish *the vessel*, its owner and/or its master, as the case may be, for the neglectful failure to pay wages" (emphasis added)); ***Peterson v. S.S. Wahcondah***, 235 F. Supp. 698, 700 (E.D. La. 1964) ("Inherent in the language of the statute then is a pre-requisite that some fund exist out of which the owner or its agents *could have paid the regular wages when they became due, or paid them sometime thereafter*" (emphasis added)); *see also* 1B BENEDICT ON ADMIRALTY, § 66, at 5-16 ("The vessel owner will

not have to pay double wages if, *at the time wages are due*, the master withholds payment for sufficient cause." (emphasis added)).

On the other hand, it bears repeating that the penalty wages statute imposes liability *only* on the vessel's "master or owner". 46 U.S.C. § 10313(g) ("When payment is not made as provided under subsection (f) of this section without sufficient cause, the *master or owner shall pay* to the seaman 2 days' wages for each day payment is delayed." (emphasis added)). Moreover, the purpose of the statute is to coerce the master or owner to promptly pay seamen's wages, unless there is sufficient cause for non-payment.

In support of its contention that penalty wages are *not* recoverable from the sale proceeds *unless* the owner has an interest in those proceeds *when* seamen seek to enforce a penalty wages lien, *rather than when the lien attaches*, the Bank relies heavily on the Supreme Court's opinion in *Collie*. There, seamen sought to recover unpaid and penalty wages from sale proceeds. Because the delay in wages payment was "due to the insolvency of the owner and the arrest of the vessel, subject to accrued claims beyond its value", the Court held the seamen were *not* entitled to penalty wages because there was "sufficient cause" for the non-payment of earned wages. It reasoned:

> The words "refuses or neglects to make payment . . . without sufficient cause" connote, either conduct which is in some sense arbitrary or willful, or at least a failure not attributable to impossibility of payment. We think the use of

> this language indicates a purpose to protect seamen from delayed payments of wages by the imposition of a liability which is not exclusively compensatory, but designed to prevent, by its coercive effect, arbitrary refusals to pay wages, and to induce prompt payment when payment is possible. Hence we conclude that the liability is not imposed regardless of the fault of the master or owner, or his retention of any interest in the vessel from which payment could be made. It can afford no such protection and exert no coercive force where delay in payment, as here, is due to the insolvency of the owner and the arrest of the vessel, subject to accrued claims beyond its value. Together these obstacles to payment of wages must be taken to be a sufficient cause to relieve from the statutory liability. . . . *Otherwise, it would not be imposed on the owner directly or through his interest in the ship, but only upon the lienors, who are neither within the letter nor the spirit of the statute.*
>
> *That the liability is not incurred* where the refusal to pay is in some reasonable degree morally justified, or *where the demand for wages cannot be satisfied either by the owner or his interest in the ship,* has been the conclusion reached with practical unanimity by the lower federal courts. . . .

281 U.S. at 55-56 (citations omitted; emphasis added). The decisions referenced by *Collie* are discussed *infra*.

Because the owner's insolvency and the arrest of the vessel, taken together, were held in *Collie* to constitute sufficient cause for wages non-payment, the subsequent above-emphasized statement that, otherwise, the penalty

would be imposed only on the lienors, is dictum. Moreover, the above-emphasized statement that "liability [for penalty wages] is not incurred . . . where the demand for wages cannot be satisfied either by the owner or his interest in the ship", *id.* at 56, implies that liability for penalty wages *is* incurred when the wages demand can be satisfied either by the owner *or his interest in the ship, i.e.*, when the owner does *not* have "sufficient cause" for non-payment of earned wages. All but one of the cases cited by *Collie* support that implication.[8]

Most of them held seamen were *not* entitled to recover penalty wages because the owner or master had sufficient cause for wages non-payment, or delay in payment. *See* ***Feldman v. American Palestine Line, Inc. (The President Arthur)***, 25 F.2d 1002, 1003 (S.D.N.Y. 1926); ***The Trader***, 17 F.2d 623, 626 (E.D.S.C. 1926); ***The Acropolis***, 8 F.2d 110, 110 (E.D.N.Y. 1923) (holding that owner's bankruptcy constituted sufficient cause for non-payment, but stating in dictum that, because "the intent of the statute is to punish the refusal or neglect of the master or owner, and is personal to them[,] therefore subsequent lienors should *not* have the fund to which they must look for payment depleted to pay a penalty which, if even properly allowable, should be paid by the master or owner" (emphasis added)); ***Villigas v. United States***, 8 F.2d 300, 301 (E.D.N.Y. 1922); ***The Sentinel***, 152 F. 564, 565 (E.D.N.Y. 1907); ***The Amazon***, 144 F. 153, 155 (W.D. Wash. 1906); ***The***

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[8] One of the cited cases did *not* involve penalty wages. ***The St. Paul***, 77 F. 998 (S.D.N.Y. 1897) (seamen discharged before commencement of voyage entitled to recover compensation *in rem* for 15 days, as provided in former 46 U.S.C. § 594).

Sadie C. Sumner, 142 F. 611, 612 (D. Mass. 1905); ***The Express***, 129 F. 655, 656 (S.D.N.Y. 1904); ***The George W. Wells***, 118 F. 761, 763 (D. Mass. 1902); ***The Alice B. Phillips***, 106 F. 956, 956 (S.D.N.Y. 1901); ***The Gen. McPherson***, 100 F. 860, 864 (D. Wash. 1900); ***The Wenonah***, 29 F. Cas. 697, 701 (D. Me. 1875).

In others, because non-payment was held to be without sufficient cause, penalty wages were allowed; but *none* of those cases involved competing liens against vessel sale proceeds. *See* ***Gerber v. Spencer***, 278 F. 886, 889-90 (9th Cir. 1922); ***Burns v. Fred L. Davis Co.***, 271 F. 439, 444 (1st Cir. 1921); ***Pacific Mail S.S. Co. v. Schmidt***, 214 F. 513, 520 (9th Cir. 1914), *rev'd*, 241 U.S. 245 (1916); ***The City of Montgomery***, 210 F. 673, 676 (S.D.N.Y. 1913). *Cf.* ***The Lake Galewood***, 21 F.2d 987, 988-89 (D. Md. 1927) (although master and owner had sufficient cause for delay in payment, penalty wages allowed because wages were *not* tendered unconditionally), *aff'd*, 25 F.2d 1020 (4th Cir.), *cert. denied*, 278 U.S. 637 (1928).

The only case cited in ***Collie*** that refused to allow penalty wages recovery from vessel sale proceeds, without relying on finding sufficient cause, is ***The Moshulu***, 276 F. 35 (N.D. Cal. 1921). The court's order allowed penalty wages; but, on entry, the court had *no* knowledge of other outstanding liens against the proceeds. Thereafter, the court disallowed the penalty wages, stating:

> [N]either the master nor the owner has any interest in the fund now in the registry of the court resulting from the sale of the vessel. To allow the penalties would be to transfer the burden thereof from the master and owner to the lienholders and the mortgagee. This I do not

> believe was ever contemplated, or intended, by Congress in enacting the statute in question.

Id. at 36. Thus, ***The Moshulu*** is the only case that supports the Bank's contention that, whether the owner has an interest in the sale proceeds is the determinative factor, *not* whether there was sufficient cause for wages nonpayment when they became due.

The ***Collie*** dictum has been treated as persuasive in several cases. ***Nadle v. M.V. Tequilla,*** 1973 A.M.C. 909 (S.D.N.Y. 1973), held that, because the sale proceeds were less than the preferred ship mortgage lien, the penalty wages statute was "presumptively *not* applicable, for the burden would fall 'only upon the lienors who are neither within the letter nor the spirit of the statute' ". *Id.* at 912 (quoting ***Collie,*** 281 U.S. at 56) (emphasis added). Nevertheless, the court held the penalty wages claims in abeyance, and referred the case to the magistrate judge to determine whether the owner was solvent *when the vessel was arrested,* stating:

> It may be, of course, that if the shipowner is *not* insolvent recourse may be had against its other assets by the preferred ship mortgagee under his judgment *in personam.* In that event it may appear that the failure to pay wages was, indeed, "without sufficient cause" and that the remaining proceeds from the sale of the vessel would exceed the amount of the maritime liens making a portion available to the crew without imposing the penalty on the lienors.
>
> The matter will, therefore, be referred to [the magistrate] to take evidence and report on the single issue of *whether the owner . . . was solvent at the time of arrest* and now has available

> assets to satisfy the claim of [the mortgagee] and leave enough for a penalty on behalf of the wage claimants.

Id. (emphasis added).

And, *George v. Kramo Ltd.*, 796 F. Supp. 1541 (E.D. La. 1992), citing *Collie*, held the equitable owner of a vessel, which was the parent corporation of the legal owner and the seaman's employer, was *not* liable for penalty wages. *Id.* at 1545-47. *See also* SCHOENBAUM, ADMIRALTY AND MARITIME LAW, Vol. 1, § 6-4, at 248 (penalty wages statute places "obligations only on 'the master or owner' of a vessel, *not* other parties who may be involved such as lenders" (emphasis added)).

Several other post-*Collie* cases have refused to impose penalty wages liability on a party other than the owner or master. In *Caldwell v. Solus Ocean Sys., Inc.*, 734 F.2d 1121 (5th Cir.), *cert. denied*, 469 U.S. 1019 (1984), cited by the district court, a seaman brought an *in personam* action against his employer to recover penalty wages. Our court held that, because the employer was neither the owner nor master of the vessel on which the seaman served, he could *not* recover penalty wages from the employer. *Id.* at 1121. To the same effect is *Sam v. Keystone Shipping Co.*, 913 F. Supp. 514 (S.D. Tex. 1996), in which a seaman filed an *in personam* action to recover penalty wages from his employer, which managed, for the vessel's owner, the vessel on which the seaman served. The court granted summary judgment for the employer, stating:

> By its plain language, the penalty wage statute imposes liability only upon the vessel's owner or master. It does *not* impose liability

> upon the master's employer or the injured seaman's employer. . . . Accordingly, the [sued employer], who is neither the master nor the owner of the vessel, as a matter of law cannot be liable for penalty wages pursuant to . . . the plain language of the statute.

Id. at 515-16 (emphasis added). ***Contra Smith v. Western Offshore, Inc.***, 590 F. Supp. 670, 674-77 (E.D. La. 1984) (seamen could *not* sue non-employer vessel owner *in personam* for wages, but were entitled to recover wages and penalty wages from their employer *in personam*).

In ***Caparelli v. Proceeds of Freight***, 390 F. Supp. 1345 (S.D.N.Y. 1974), also cited by the district court, seamen asserted an *in rem* claim against freight proceeds and an *in personam* claim against the bank, which held a first preferred ship mortgage and was claimed to possess or control those proceeds; they also sought leave to amend their complaint to assert a penalty wages claim *against the bank*. *Id.* at 1347. In denying the requested amendment, the court stated:

> [The bank] was *not* a master or owner, but a mortgagee. Plaintiffs concede that they have found *no* case in which liability for double wages has been applied to a mortgagee. Since there appears *no* basis on which to hold [the bank], as holder of a first preferred mortgage on each of the vessels, liable for penalty wages . . . , [the seamen's] motions to amend . . . are denied.

Id. at 1351 (emphasis added).[9]

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[9] *See also Chung, Yong Il*, 774 F.2d at 1052 ("allowing a shipowner to avoid penalty wages liability through a contract

As noted, the seamen maintain that, for determining whether their penalty wages lien can be enforced against the proceeds, the district court should have focused on whether Golden Lines had sufficient cause for wages non-payment when due. In support, they rely on the Supreme Court's most recent case concerning the penalty wages statute, ***Griffin v. Oceanic Contractors, Inc.***, 458 U.S. 564 (1982).

Griffin involved an *in personam* action by a seaman against the vessel owner, which was also his former employer. The district court found the owner's refusal to pay earned wages was without sufficient cause, but imposed the wages penalty only for the period of non-payment during which the seaman was unemployed.

The Supreme Court stated that the statute provided for payment of the wages penalty upon satisfaction of two conditions:

> First, the master or owner must have refused or failed to pay the seaman his wages within the periods specified. Second, this failure or refusal must be "without sufficient cause." Once these conditions are satisfied, however, the unadorned language of the statute dictates that the master or

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would contravene the public policy implicit in the statute", which "speaks in terms of assessing penalty wages against only a vessel owner or a master"); ***Parcel Tankers, Inc. v. M/T Stolt Luisa Pando***, 787 F. Supp. 614, 621 (E.D. La. 1992) (finding sufficient cause for alleged wrongful withholding, but stating that mortgagee was *not* liable for penalty wages because "[t]he statute places obligations on 'the master or owner' " (emphasis added)), *aff'd*, 990 F.2d 827 (5th Cir. 1993), *cert. denied*, 510 U.S. 1071 (1994).

> owner "*shall pay* to the seaman" the sums specified "*for each and every day* during which payment is delayed."

Id. at 570 (emphasis in original). The Court thus concluded that district courts have *no* discretion to limit the period during which the penalty is assessed, and that its imposition is mandatory for each day of delay unless further delay is justified by sufficient cause. *Id.* at 574-75 & n.9, 577. Accordingly, the seaman recovered over $300,000 for the owner's delay in paying but $412.50 in wages. *Id.* at 574-75.

Griffin is *not* particularly helpful in resolving the issues in this case, because, unlike the present *in rem* action, it was an *in personam* action against the vessel owner. Moreover, unlike the case at hand, it did *not* involve competing liens against sale proceeds insufficient to satisfy those liens.

Based on the facts at hand, and our exhaustive review of the statutes and related jurisprudence, the district court held correctly that the penalty wages statute's plain language precludes enforcement of the penalty wages liens at issue against the sale proceeds. The statute imposes liability for such wages only on the vessel *master or owner*. Its purpose is to coerce them to promptly pay seamen's wages. When, as here, sale proceeds are insufficient to satisfy all of the liens against the vessel, the owner has *no* interest in those proceeds. Therefore, because it has *no* interest, it has *no* proceeds against which the lien can be enforced. Concomitantly, the purpose of the statute is *not* furthered by enforcing a penalty wages lien against such sale proceeds.

To enforce the lien against proceeds in which the owner has *no* interest would be to act contrary to the plain language of the statute. As discussed, seamen, "wards of admiralty", have received favored treatment from Congress, and legislation enacted for their benefit is to be liberally construed in their favor. But, when interpreting legislation, we must always seek to give effect to the plain language chosen by Congress. ***E.g., Griffin,*** 458 U.S. at 570 ("[o]ur task is to give effect to the will of Congress, and where its will has been expressed in reasonably plain terms, that language must ordinarily be regarded as conclusive" (internal quotation marks and citation omitted)).

And, we also must assume that Congress knew what it was doing when it selected the objects for penalty wages liability. Lien law regarding seamen's wages had been established long before enactment of the first penalty wages statute in 1872. ***E.g., The Nestor,*** 18 F. Cas. at 14. Accordingly, we must presume that Congress was aware of that well-settled law when it made the policy decision to make *only* the owner and master liable for such wages. *See* ***Keene Corp. v. United States,*** 508 U.S. 200, 212 (1993) (Congress is presumed to be aware of settled judicial interpretations). Had Congress desired to allow enforcement of penalty wages liens against vessel sale proceeds, *when neither the owner nor the master has an interest in those proceeds,* it easily could have said so. ***E.g., Humana, Inc. v. Forsyth,*** 525 U.S. 299, 309 (1999).

III.

For the foregoing reasons, the partial summary judgment is

AFFIRMED.

DENNIS, Circuit Judge, dissenting.

Because I believe that the district court erred in granting the Bank of Scotland's motion for partial summary judgment, I respectfully dissent.

On April 22, 1998 the seamen for the M/V MARIA filed suit in Louisiana state court against Golden Lines Shipping, Inc., the owner of the vessel, and Kosmas Marine Line, Inc., the manager of the vessel, for unpaid wages. The state court issued a writ of attachment and the M/V MARIA was seized by the sheriff on April 22. The Bank of Scotland, holder of a preferred mortgage lien on the M/V MARIA, also filed suit in April 1998 in federal court to foreclose its mortgage on the vessel. An arrest warrant issued by the district court was served on the vessel on April 29, 1998. The following month, Golden Lines Shipping and Kosmas Marine Line removed the seamen's suit to federal court. The two causes of action were consolidated and the seamen intervened in the federal action.

The Bank of Scotland subsequently purchased the vessel at an auction conducted by the United States Marshal for $3.7 million, an amount less than the outstanding debt secured by the mortgage. According to the Bank of Scotland, the seamen's maritime liens for back wages and penalty wages were subordinate to its mortgage lien and would not be paid because the sale proceeds were insufficient to satisfy the mortgage lien. Although the district court determined that the seamen's maritime liens were not subordinate to the Bank of Scotland's preferred mortgage lien, the district court also ruled that the maritime lien for penalty wages was not enforceable against the

proceeds of the vessel sale because the owner had no interest in the vessel or the proceeds after the auction sale. The district court based its decision on the penalty wage statute which states, in pertinent part, that "[w]hen payment is not made as provided . . . without sufficient cause, the master or owner shall pay to the seaman 2 days' wages for each day payment is delayed." 46 U.S.C. § 10313(g). Based on the language in the penalty wage statute, the district court refused to enforce the seamen's maritime lien against the sale proceeds because neither the master nor owner had an interest in the proceeds.

The seamen contend that they have a maritime lien which is superior to the Bank of Scotland's mortgage lien based upon the ship mortgage act. The ship mortgage act does not limit liability for maritime liens to a vessel's owner or master. Rather, it states that when a vessel is sold to enforce a preferred mortgage lien all claims in the vessel existing on the date of the sale are terminated. *See* 46 U.S.C. § 31326(a). These terminated claims "attach [ ], in the same amount and in accordance with their priorities to the proceeds of the sale", 46 U.S.C. § 31326(b), except that preferred maritime liens have priority over a preferred ship mortgage. Preferred maritime liens include "a maritime lien on a vessel . . . for wages of the crew of the vessel." 46 U.S.C. § 31301(5)(D). A penalty wage lien has the same priority as a wages lien. *See Collie v. Fergusson*, 281 U.S. 52, 54 (1930); *Peterson v. S.S. WAHCONDAH*, 331 F.2d 44, 48 (5th Cir. 1964).

In addition to the penalty wage statute, the district court cited two cases in determining that penalty wages should not be assessed against a party that is neither the

owner nor the master of a vessel. Both cases are distinguishable from the facts of the present appeal. In *Caldwell v. Solus Ocean Systems, Inc.*, 734 F.2d 1121, 1122 (5th Cir. 1984), a Solus employee who worked on a vessel that Solus chartered brought suit against Solus pursuant to the penalty wage statute. The court determined that the penalty wage statute did not extend to an employer. *See id.* ("Because it is undisputed that Solus was not the master or the owner of the vessel on which Caldwell was employed, but was Caldwell's employer, the sole issue before us is whether section [10313] extends to 'employers' as well as those parties enumerated in the statute. We hold that it does not."). Likewise, *Caparelli v. Proceeds of Freight*, 390 F. Supp. 1345 (S.D.N.Y. 1974) did not state that seamen were not entitled to assert their maritime lien for penalty wages against the proceeds from the sale of a vessel. The district court refused to allow the seamen to amend their pleadings to state a cause of action for penalty wages under 46 U.S.C. § 596 [now § 10313] directly against a ship mortgagee because the statute does not grant a cause of action against the holder of a mortgage on a vessel, rather than a vessel owner or master. *See id.* at 1351.

The majority opinion attempts to justify the result of the district's court judgment on the ground that the seamen are limited to a suit in personam to satisfy their maritime lien. However, it is well established that seamen may seek to satisfy their liens by both in rem and personam proceedings:

> [M]ariners' wages, salvage, freight and bottomry are maritime causes of action [and] the court of admiralty has jurisdiction and may use

> any of its appointed modes to give the party any remedy to which the law entitles him. The substratum of the action is the liability of one party to respond to another and the court may enforce it against the person, or against a particular portion of his property, or against his property generally, as the law may have provided the right. If the claim, which is the cause of action, be, by law, alien upon a vessel, her cargo, freight, the proceeds of the same, or the remnants and surplus thereof, the court may enforce that lien by a suit *in rem*, or, without reference to the lien may compel the party himself to pay the demand. Remedies *in rem* and *in personam* may co-exist or one may be independent of the other, e.g., a right of action *in personam* may be recognized where no lien is given by the maritime law.

2 BENEDICT ON ADMIRALTY § 25, at 2-18 (1999). Hence, the seamen are not limited to a suit *in personam* to satisfy their maritime lien. Whether the proceeding is *in rem* or *in personam* has no bearing in our determination of whether the seamen's maritime lien has priority over the Bank of Scotland's mortgage lien following the sale of the vessel.

Since the *in rem/in personam* distinction does not resolve the merits of this case, the court must analyze the terms of the penalty wage statute and the ship mortgage act. *Equilease Corp. v. M/V SAMPSON*, 793 F.2d 598 (5th Cir. 1986), discussed the history of the ship mortgage act. *Equilease Corp.* states, in pertinent part:

> The federal maritime lien is a unique security device, serving the dual purpose of keeping ships moving in commerce while not allowing

> them to escape their debts by sailing away. The lien is a special property right in the vessel, arising in favor of the creditor by operation of law as security for a debt or claim. The lien arises when the debt arises, and grants the creditor the right to appropriate the vessel, have it sold, and be repaid the debt from the proceeds. Thus the maritime lien may be defined as a property right that adheres to the vessel wherever it may go. Such a lien has been held to follow the vessel even after it is sold to an innocent purchaser. The maritime lien is a lien on the vessel, "and only indirectly, inasmuch as it conflicts with the owner's rights in the vessel, it is connected with the owner." The maritime lien concept thus somewhat personifies a vessel as an entity with potential liabilities independent and apart from the personal liability of its owner . . . The Act provides a right to a federal maritime lien to "any person furnishing repairs, supplies, . . . or any other necessaries, to any vessel. . . . " . . . Necessaries are the things that a prudent owner would provide to enable a ship to perform well the functions for which she has been engaged. These "things" may be money, labor and skill, and personal services as well as materials.

Id. at 602-03 (internal citations omitted). Thus, there is a distinction between the creation and the enforcement of a maritime lien. *See also The Nestor*, 18 F. Cas. 9, 14 (C.C.D. Me. 1831), which states, in pertinent part:

> If seamen's wages were by the contract not payable until ten days after the voyage was completed, it would not disturb the lien on the ship for those wages. The lien has in all such cases an

> inchoate existence from the moment of the contract, and attaches sub modo on the ship. The lien for seamen's wages attaches ordinarily on the ship during the voyage, although no wages are strictly due until the end of the voyage. A sale of the ship, pending the voyage, would not defeat this inchoate lien; and when the voyage was completed, the lien would have relation back to the commencement of the voyage.

By furnishing their labor and personal services to the M/V MARIA, the seamen were entitled to a maritime lien which was created by operation of law when their wages were due and payable. This lien "follow[ed] the vessel even after it [was] sold to [the Bank of Scotland]." Based upon the plain language of the ship mortgage act, the seamen's penalty wage lien attached to the proceeds from the sale of the vessel as a preferred maritime lien with priority over the Bank of Scotland's preferred ship mortgage. *See* 46 U.S.C. § 31326(b)(1). Thus, the district court erred in ruling that the seamen's maritime lien for penalty wages was not enforceable against the proceeds of the vessel.

The seamen's maritime lien for penalty wages, in excess of $6.8 million, exceeds the lien for their unpaid wages of $260,618. In *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564 (1982), the petitioner was entitled to more than $300,000 in penalty wages as a result of the improper withholding of $412.50 by the vessel owner. The vessel owner argued that a literal interpretation of the penalty wage statute "would produce an absurd and unjust result which Congress could not have intended." *Griffin*, 458 U.S. at 574. The Supreme Court rejected this argument, stating that:

> In refusing to nullify statutes, however hard or unexpected the particular effect, this Court has said: "Laws enacted with good intention, when put to the test, frequently, and to the surprise of the law maker himself, turn out to be mischievous, absurd or otherwise objectionable. But in such case the remedy lies with the law making authority, and not with the courts." . . . It is enough that Congress intended that the language it enacted would be applied as we have applied it. The remedy for any dissatisfaction with the results in particular cases lies with Congress and not with this Court . . . As we explained earlier, a condition to the imposition of the wage penalty is a finding that the delay in payment is "without sufficient cause." To the extent that the equities of the situation are to be considered, they bear on that finding, and not on the calculation of the penalty period once that finding has been made.

Id. at 575-77 (internal citations omitted).

In addition, neither the majority opinion nor the district court considered whether there was a genuine issue as to the material fact of the owner's insolvency when the unpaid wages began to accrue and the seamen's maritime lien attached to the owner's vessel. The seamen raised a genuine issue of material fact concerning the solvency of the vessel owner that should have permitted the case to go to trial.

A district court's decision to grant or deny summary judgment is reviewed de novo, applying the same criteria employed by the trial court in the first instance. *See Burge v. Parish of St. Tammany*, 187 F.3d 452, 464 (5th Cir. 1999).

Summary judgment is proper when the pleadings, depositions, admissions, and answers to interrogatories, together with affidavits, demonstrate that no genuine issue exists as to any material fact and that the movant is entitled to judgment or partial judgment as a matter of law. *See* Fed.R.Civ.P. 56(c); *Burns v. Harris County Bail Bond Bd.*, 139 F.3d 513, 517-18 (5th Cir. 1998). We view all facts in the light most favorable to the non-movant and draw all reasonable inferences in the non-movant's favor. *See Coleman v. Houston Indep. Sch. Dist.*, 113 F.3d 528, 533 (5th Cir. 1997). If the non-movant sets forth specific facts in support of allegations essential to her claim, a genuine issue of material fact is presented and summary judgment is inappropriate. *See id.*

Seamen must be paid their wages within 24 hours after the cargo has been discharged or within four days after the seamen have been discharged. *See* 46 U.S.C. § 10313(f). If the seamen do not receive their wages "without sufficient cause, the master or owner shall pay to the [seamen] 2 days' wages for each day payment is delayed." 46 U.S.C. § 10313(g). The Supreme Court discussed the requirements for payment of delay wages in *Griffin*. Two conditions must be satisfied before seamen are entitled to delay wages:

> First, the master or owner must have refused or failed to pay the seaman his wages within the periods specified. Second, this failure or refusal must be "without sufficient cause." Once these conditions are satisfied, however, the unadorned language of the statute dictates that the master or owner "shall pay to the seaman"

> the sums specified "for each and every day during which payment is delayed." The words chosen by Congress, given their plain meaning, leave no room for the exercise of discretion either in deciding whether to exact payment or in choosing the period of days by which the payment is to be calculated.

Griffin, 458 U.S. at 570.

In determining the seamen's entitlement to delay wages, the district court should not consider whether there was sufficient cause for delay in payment *after* a suit has been filed. Rather, "liability for double wages accrues, if at all, from the end of the period within which payment should have been made." *McCrea v. United States*, 294 U.S. 23, 31-32 (1935). The mere fact of late payment of wages does not entitle the seamen to delay wages, however. If wages are not paid in a timely fashion "due to the insolvency of the owner and the arrest of the vessel", the owner has shown sufficient cause for nonpayment and is relieved of statutory liability for delay wages. *Collie v. Fergusson*, 281 U.S. 52, 56 (1930).

The district court had evidence that the seamen were not paid in a timely fashion and that the owner did not have sufficient cause for nonpayment of wages when the wages were owed. The seamen introduced evidence that they were not paid wages on two occasions, March 24, 1997 and April 20, 1998. They also produced audited financial statements for the M/V MARIA stating that the vessel's profit in 1997 was $113,000. Based upon these financial statements, the seamen argue that the owner was not insolvent on March 24, 1997 when they should have received their wages. The Bank of Scotland arrested

the M/V MARIA on April 29, 1998 to foreclose on its mortgage. Thus, the evidence indicates that on March 24, 1997, one of the dates when wages were owed to the seamen, the owner of the vessel was not insolvent and the M/V MARIA had not been arrested. At that time, the seamen's maritime lien attached and the owner had an interest in the vessel. The owner failed to show sufficient cause for nonpayment and has not been relieved of statutory liability for delay wages according to *Collie*.

The district court failed to analyze the requirements for payment of delay wages and mistakenly considered the insolvency of the vessel owner at the time of the sale as being crucial, not when the maritime lien attached upon the penalty wages becoming due and payable to the seamen. Based upon these shortcomings, I would REVERSE the judgment of the district court and remand the case for a trial on the disputed material issues of fact.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

THE GOVERNOR AND COMPANY OF THE BANK OF SCOTLAND	*	CIVIL ACTION NO. 98-1187 (REF: ALL CASES)
VERSUS	*	
MARIA S.J. MN, In rem, ET AL.	*	SECTION "L" (3)

ORDER AND REASONS

(Filed Nov. 5, 1998)

Before the Court is the motion of plaintiff The Governor and Company of the Bank of Scotland ("Bank") for summary judgment dismissing claims filed by former crewmembers of the vessel M/V MARIA S.J. For the following reasons, the Bank's motion is hereby DENIED in part, as it relates to claims for unpaid wages, and GRANTED in part, as it relates to claims for delay or penalty wages under 46 U.S.C. § 10313.

BACKGROUND

This case stems from the claims of former crewmembers of the vessel M/V MARIA S.J. for unpaid wages. Golden Lines Shipping, Inc. ("Golden Lines") owned the vessel and, according to the seamen, failed to pay wages pursuant to an earlier settlement agreement between Golden Lines and the union for the crewmembers. The crewmembers filed suit against the owners in the Twenty-Fifth Judicial District Court of Plaquemines Parish, Louisiana. Pursuant to a writ of attachment, the Sheriff of

Plaquemines Parish took custody of the M/V MARIA S.J. on April 22, 1998 when the vessel entered the Mississippi River. On April 30, 1998 the Bank, holder of a preferred ship mortgage lien on the vessel, caused the United States Marshal to execute a warrant of arrest on the M/V MARIA S.J. Eventually Golden Lines removed the underlying state proceeding to this Court and the sheriff left the vessel, while the United States Marshal remained onboard.

On June 24, 1998 the former crewmembers filed an intervention in this proceeding, asserting claims for unpaid wages, delay wages pursuant to 46 U.S.C. § 10313, attorneys' fees, and costs. The 102 crewmembers involved allege that they are still owed a total of $292,635.00 in overdue wages. Apparently, only forty-eight of the seamen seek the statutory delay wage payment.

On July 2, 1998 the Bank purchased the M/V MARIA S.J. at an auction conducted by the marshal for $3.7 million, using the outstanding amount of the mortgage, which exceeded $15 million, in a credit bid in lieu of cash payment. On July 7, 1998, on motion of the Bank and by Order of this Court, the Bank posted a letter of undertaking for the amount of the purchase "to pay any final judgment in relation to any claim[s] against the vessel filed prior to July 2, 1998, in the above-referenced action that are held to [sic] have priority over Bank of Scotland's claims against the vessel." Mot. Pl. & Order to Approve Form and Amount of Letter of Undertaking, at 2.

On October 13, 1998 the Bank filed its motion for summary judgment, asking the Court to dismiss the claims filed by the former crewmembers. The Bank cites

three grounds upon which it urges the Court to grant the motion. First, the Bank argues that only the owner or master of the vessel is liable for delay or penalty, wages under the statute, so that such awards are not recoverable from the proceeds of sale of a vessel where, as here, the balance owed by the owner far exceeds the amount of proceeds. To tap the sale proceeds for penalty wages would effectively penalize parties other than the owner or master, who possesses no interest in such proceeds. According to the Bank, such a result is contrary to the express language of 46 U.S.C. § 10313. Second, the Bank contends that wage claimants do not enjoy a preferred maritime lien for penalty wages. Third, the Bank suggests that the claimants in this proceeding, the former crew-members, cannot even maintain an in rem action because they failed to arrest the M/V MARIA S.J. The Bank does not specify whether it is contesting the penalty wage claims only or the claims for back pay as well.

On October 22, 1998 the seamen filed their response, opposing the motion and attempting to refute each of the arguments asserted by the Bank.

ANALYSIS

Summary judgment will be granted only if the pleadings, depositions, answers to interrogatories, and admissions, together with affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56. In this analysis, the Court must view the facts and inferences from the evidence in the light most favorable to the nonmoving party. *See Crescent Towing &*

Salvage Co. v. M/V ANAX, 40 F.3d 741, 743 (5th Cir. 1994). Once the moving party has demonstrated that there is no genuine issue of material fact, the burden shifts to the nonmoving party to prove that there is a genuine issue of material fact. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

It appears undisputed that the Bank held a preferred mortgage exceeding $15 million, that the Bank purchased the vessel at auction for $3.7 million, and that the seamen have asserted wage and delay wage claims against the proceeds of sale of the M/V MARIA S.J. It is therefore appropriate to consider summary judgment in this matter.

The Court feels it is helpful to address the Bank's three arguments in reverse order. Since the Bank's motion does not make clear whether it is merely disputing the penalty wage claims or those for unpaid wages as well, the Court will examine both issues.

A. The Crewmembers Can Maintain an In Rem Claim

It is true that the crewmembers did not cause the United States Marshal to arrest the M/V MARIA S.J. However, they had caused the Sheriff of Plaquemines Parish to serve a writ of attachment on the vessel, and to place deputies onboard, eight days before the Bank took action. Moreover, on June 24, 1998 this Court ordered that the vessel's arrest remain in full force and effect to serve as security for the claims of the intervenor crewmembers. It would be curious for the Court to agree with the Bank that those same crewmembers could not now maintain

their wage claims simply because they did not arrest the vessel themselves. Indeed, accepting the Bank's logic would mean that wage claimants would always be required to arrest a vessel whether or not it had already been arrested by another party. Such a result strains reason. The crewmembers are not barred from maintaining their claims.

B. The Crewmembers Possess a Preferred Maritime Lien for Wages and Delay Wages

A preferred ship mortgage enjoys priority over all claims against a vessel, with the exception of expenses and preferred maritime liens. *See International Paint Co. v. M/V MISSION VIKING*, 637 F.2d 382, 385 (5th Cir. 1981). Wages of the crew fall within the category of preferred maritime liens. *See id.* Indeed, it is axiomatic that claims for seamen's wages "have the highest priority among maritime liens," *Bender Welding and Machine Co. v. M/V SOVEREIGN OPAL*, 415 F. Supp. 772, 774 (S.D. Ala. 1976), and courts treat these as "sacred liens," *see First Nat'l Bank of Jefferson Parish v. M/V LIGHTNING POWER*, 776 F.2d 1258, 1262 (5th Cir. 1985); *International Paint*, 637 F.2d at 385; *Peterson v. S.S. Wahcondah*, 235 F. Supp. 698, 700 (E.D. La. 1964).

When seamen are not paid the wages due them, "the master or owner shall pay to the seaman 2 days' wages for each day payment is delayed." 46 U.S.C. § 10313. The Bank asserts that payments under this provision are penalty wages, thus deserving the priority assigned to other penalties or fines rather than that accorded wages. "The seamen's lien for penalty wages is accorded the same

sacred priority as the lien for wages, and attaches to proceeds from both the sale of the vessel and the earned 'freight.' " *Peterson*, 235 F. Supp. at 700. Although the court in *Peterson* was construing 46 U.S.C. § 596, the predecessor to § 10313, this Court has located no case law which persuasively suggests that Congress intended the two provisions to be read differently with regard to the priority of penalty wage claims. Accordingly, the Court adopts the rule stated in *Peterson* and holds that claims for penalty wages under § 10313 enjoy the same sacred priority accorded claims for seamen's wages.

The case law is clear that claims for seamen's wages enjoy priority status over a preferred ship mortgage. Claims for penalty wages are afforded equal ranking. The Bank cannot sustain its position that these two liens merit different priority.

C. The Proceeds of Vessel Sale Are Available to Pay Wages, But Not Penalty Wages

Although the jurisprudence affords wage claims and penalty wage claims equal priority, the availability of penalty wages is nevertheless narrower than that of unpaid wages in general. The language of the penalty wage statute commands this result, since it clearly states that "the *master or owner* shall pay the seaman 2 days' wages for each day payment is delayed." 46 U.S.C. § 10313 (emphasis added). Courts interpreting § 596 have refused to assess penalty wages against parties who were neither owner nor master of the vessel in question. *See, e.g., Caldwell v. Solus Ocean Sys., Inc.*, 734 F.2d 1121 (5th Cir. 1984) (noting the court's inability to locate any case

imposing penalty wage liability under § 596 on any party other than an owner or master); *Caparelli v. The Proceeds of Freight, S.S. Cortland, S.S. Bowling Green, and S.S. Whitehall,* 390 F. Supp. 1345 (S.D.N.Y. 1974) (refusing to impose penalty wage liability on holder of first preferred mortgage where plaintiff could cite no case supporting such liability).

The issue in this case is whether the proceeds from the sale of the M/V MARIA S.J. constitute an interest of the owner or master such that the crewmembers may claim against them for penalty wages. Indeed, "inherent in the language of the statute then is a pre-requisite that some fund exist out of which the *owner or its agents* could have paid the regular wages." *Peterson,* 235 F. Supp. at 700 (emphasis added). If the owner or master possess no interest in the proceeds of sale, permitting a penalty wage claim against the proceeds is the functional equivalent of allowing the claim against a party other than the owner or master, a result clearly at odds with the jurisprudence. Moreover, the statute can "exert no effective coercive force where delay in payment . . . is due to the insolvency of the owner and the arrest of the vessel, subject to accrued claims beyond its value." *Collie v. Fergusson,* 281 U.S. 52, 56 (1930); *see also Bender Welding,* 415 F. Supp. at 775.

In the present case, Golden Lines's outstanding indebtedness to the Bank approximates $15 million. Sale of the M/V MARIA S.J. has yielded $3.7 million. Under these facts, the Bank asserts, and the Court agrees, that the owners lack any real interest in the proceeds of sale. Consequently, permitting a penalty wage claim against the proceeds would essentially penalize a party other

than the owner or master, be it the Bank or some other creditor. This result violates the language and spirit of § 596 and its progeny, § 10313.

The foregoing analysis dictates that the proceeds from the sale of the M/V MARIA S.J. are available to pay the crewmembers' claims for unpaid wages. Although the law accords the same priority to claims for penalty wages under § 10313, the Court finds that, in this case, penalty wages are not payable out of the proceeds from the sale of the vessel.

CONCLUSION

For the foregoing reasons, IT IS ORDERED that the motion of plaintiff The Governor and Company of the Bank of Scotland for summary judgment dismissing the claims of the former crewmembers of the M/V MARIA S.J. is hereby DENIED in part, as it relates to claims for unpaid wages, and is hereby GRANTED in part, as it relates to claims for delay or penalty wages under 46 U.S.C. § 10313. The claims of the former crewmembers for penalty wages made against the proceeds of sale of the vessel are hereby DISMISSED.

New Orleans, Louisiana
This 4 day of November 1998.

/s/ Illegible
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 99-30102

THE GOVERNOR AND COMPANY OF THE BANK OF SCOTLAND

Plaintiff-Appellee

v.

HECTOR SABAY; VOLODYMYR SHEVCHUK; NORMAN SOLIS; NOEL SOMOSIERRA; GERRY SUYAT; ET AL

Intervenors-Appellants

v.

MARIA S J MV, her engines, tackle, lifeboats, anchor, chain, equipment and appurtenances, in rem, ET AL

Defendants

Appeal from the United States District Court for the Eastern District of Louisiana, New Orleans

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ON PETITION FOR REHEARING EN BANC

(Opinion 4/28/00, 5 Cir., ___, ___ F.3d ___)

(Filed Jun. 2, 2000)

Before JONES, BARKSDALE, and DENNIS, Circuit Judges.

PER CURIAM:

(X) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Illegible
United States Circuit Judge

Rehg-6a